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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 443

GUY E. FOSTER, ET AL,
Appellants,

vs.

EMORY BAY, ET AL,
Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Preliminary Statement	1
ARGUMENT	2
The argument advanced by appellee rests upon the assumption of a statute wholly different from those here challenged, and the decisions cited by appellees are consequently inapposite	2
A. The challenged statutes expressly declare the object of the tax to be "for general revenue purposes" of the State, not for designated public improvements; and they specify the areas to be taxed as those "from which tax donations" had been granted, not as areas specially benefited by designated improvements	2
B. The statutes which appellees cite as carrying a legislative finding that the taxed areas are specially benefited by Brazos District improvements not only fail to support the asserted finding but define as to such improvements a "benefit area" distinct and different from that to which the challenged taxes apply	5
C. The 1936 decision of the Supreme Court of Texas in Brazos River Conservation a l Reclamation District v. McCraw is not stare c sis of the validity of the amendment to the Texas Constitution adopted in 1948, providing for continued taxation of appellants' properties after 1951	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

	Page
Big Slough Drainage Dist. v. Board of County Comm'rs, 336 U.S. 957	3
Board of Comm'rs v. Ohio ex rel. Bowman, 286 U.S. 256	3
Brazos River Conservation & Reclamation Dist. v. McCraw, 136 Tex. 506, 91 S.W. 2d 665	9
County of Mobile v. Kimball, 102 U.S. 691	3
Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112	3, 8
Hagar v. Reclamation District, 111 U.S. 701	3
Houck v. Little River District, 239 U.S. 254	3
Martha Bright Farms, Inc. v. Davis, 293 U.S. 531	3
Milheim v. Moffat Tunnel Impr. Dist., 262 U.S. 710	3, 8
Miller & Lux, Inc. v. Sacramento & San Joaquin Drainage Dist., 256 U.S. 129	3
Spencer v. Merchant, 125 U.S. 345	3
Williams v. Eggleston, 170 U.S. 304	3

Texas Statutes

Section 1a, Article VIII, Texas Constitution	2
Section 51, Article III, Texas Constitution	9
Acts 44th Leg., Reg. Sess. 1935, Chap. 19	6
Acts of 1st Called Session, 44th Leg., Chap. 368, p. 1527	2, 4, 6, 9

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Appellants' Brief in Opposition to the Motion To Dismiss or Affirm

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The "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" which has been filed by appellees does not challenge the jurisdiction of this Court over the appeal, but is predicated entirely upon their assertion that the federal question is unsubstantial. This brief consequently will be limited to the substantive question, and is intended to supplement the discussion contained in the Jurisdictional Statement.

The argument advanced by appellees rests upon the assumption of a statute wholly different from those here challenged, and the decisions cited by appellees are consequently inapposite.

A. The challenged statutes expressly declare the object of the tax to be "for general revenue purposes" of the State, not for designated public improvements; and they specify the areas to be taxed as those "from which tax donations" had been granted, not as areas specially benefited by designated improvements.

In abolishing the state ad valorem tax "for general revenue purposes" formerly levied uniformly on properties throughout the state, the challenged Texas constitutional amendment[1] provided that nevertheless "the full amount of the State ad valorem tax" should for the term specified "continue" to be levied in those areas "from which tax donations have heretofore been granted." The enabling act[2] thereunder is to like effect.

In the Jurisdictional Statement, appellants attacked the purported classification by which the tax was thus continued as to some of the original class of taxpayers, and discontinued as to remainder, upon the ground that the basis of discrimination employed by the challenged statutes is not reasonably related to the object of raising funds for general revenue purposes of the State.

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[1] Section 1a, Article VIII, Texas Constitution; copied in full as Item 1, Appendix B of the "Jurisdictional Statement."

[2] Section 10(a), Chap. 364. p. 853, Acts Reg. Sess. 51st Legis. of Texas, as amended by Chap. 389, p. 672, Acts 52nd Legis. Copied as Item 2, Appendix B of the Jurisdictional Statement.

Appellees do not, in their Motion to Dismiss or Affirm, attempt to defend the classification which the challenged statutes employ: they do not argue that the basis of discrimination stated in the statutes is reasonable, or properly related to the object of raising funds for general state purposes.

Instead, appellees first launch into a general discussion of the decisions by this Court which hold that a tax imposed by a state to defray the cost of a specifc public improvement constitutes no denial of equal protection because it is limited to properties within a geographical area which is found specially benefited by such improvement. *Houck v. Little River District* (1915) 239 U.S. 254, and *Hagar v. Reclamation District* (1884) 111 U.S. 701 are typical; the other cases cited by appellees are listed below in the margin.[3] Appellees then assert that "the substance" of the challenged statutes "is identical in effect" with the legislation sustained by this Court in such cases as *Houck* and *Hagar*. But the motion will be searched in vain for a single word quoted by appellees from the challenged statutes for any purpose, much less to demonstrate the asserted substantial identity of the statutes in controversy with those heretofore sustained.

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[3] *County of Mobile v. Kimball* (1880) 102 U.S. 691; *Spencer v. Merchant* (1888) 125 U.S. 345; *Fallbrook Irrigation Dist. v. Bradley* (1896) 164 U.S. 112; *Williams v. Eggleston* (1897) 170 U.S. 304; *Miller & Lux, Inc. v. Sacramento & San Joaquin Drainage Dist.* (1921) 256 U.S. 129; *Big Slough Drainage Dist. v. Board of County Comm'rs* (1949) 336 U.S. 957; *Martha Bright Farms, Inc. v. Davis* (1934) 293 U.S. 531; *Board of Comm'rs v. Ohio ex rel. Bowman* (1932) 286 U.S. 256; *Milheim v. Moffat Tunnel Impr. Dist.* (1923) 262 U.S. 710.

At all events, the only defense which appellees' motion makes of the challenged statutes is hinged upon the assumption that (a) the tax levied thereby is for specific public improvements, and (b) the area to which the tax is limited was selected to bear the burden because of an express or implied finding that it was specially benefited by such improvements. The first, and we submit, complete answer to any such conception is that the challenged statutes themselves both expressly state the object of the tax as being "for general revenue purposes" of the State—not for a specific public improvement.

The Motion does not assume to say just what operates to change the tax from the declared object of raising funds "for general revenue purposes" to a tax for specific public improvements, unless the assertion (p. 5 of typewritten copy) that "the Texas Legislature by the legislation now challenged unequivocally devoted the proceeds of such special levies to public improvements by the Brazos District" is sufficient.

It is true that so much as is necessary of the proceeds of the challenged levies are allocated to the discharge of the appropriation made by the State to the Brazos District under the 1935 "tax donation" act.* In 1951, the levy of 30c per hundred on properties within the ten counties named in the 1935 act amounted to $928,633.88; and of this, $309,000 was paid over to the Brazos District in discharge of the annual state appropriation made by the 1935 act.

* Chap. 368, p. 1527, Acts 1st Called Session, 44th Legis. Copied in pertinent part as Item 3, Appendix B of the Jurisdictional Statement.

However, the fact that part of the proceeds of the tax laid "for general revenue purposes" were used to pay off an appropriation to an improvement district (or even had they been used for the construction of a work of improvement by the state itself) does not change the object or purpose of the tax to one "for public improvements" in attempting to justify its limitation to a particular area. The conception that such use of the proceeds supports the challenged tax as one for improvements, and consequently justifies its limitation to the ten-county area named in the 1935 appropriation act, is more fully considered and answered in the last four pages of the Jurisdictional Statement. For the additional reasons there stated, we respectfully submit that appellees' argument is without merit, and that the validity of the challenged statutes is to be measured by the object therein stated, and by the basis of classification expressly employed by the statutes.

B. The statutes which appellees cite as carrying a legislative finding that the taxed areas are specially benefited by Brazos District improvements not only fail to support the asserted finding, but define as to such improvements a "benefit area" distinct and different from that to which the challenged taxes apply.

In arguing that the challenged taxes are to be considered special levies imposed upon Grimes and the nine other counties named in the 1935 tax-donation act, appellees assert in the Motion to Dismiss or Affirm (page 5):

"Likewise, the Texas Legislature by the legislation now challenged unequivocally devoted the proceeds of such special levies to public improvements

by the Brazos District which improvements had long before been found by the Legislature to be 'the only practical and legal means' [citing by footnote Acts 44th Leg., Reg. Sess. 1935, Ch. 19, § 3(a)] for relieving *these counties* 'of recurrent, devastating floods'." [Citing for the last internal quotation, Acts of 1st Called Session, 44th Legislature, Chap. 368, § 5. Emphasis supplied.]

Thus stated, it would indeed appear that the ten-county area (including Grimes County) had been found in the earlier legislation cited to be specially benefited by the Brazos District's dam. We submit, however, that the statutes themselves not only fail to support the asserted finding of special benefit to the ten-county area, but that they affirmatively disclose that the area found specially benefited by Brazos District improvements is a distinct and different area. For convenience of reference, section 3(a) of Chapter 19 is copied in the margin as footnote 5; and Section 5 of Chapter 368 is copied as footnote 6. The language of these statutes, in full context, discloses that the area as to which the control of floods upon the Brazos and its tributaries would constitute a special benefit is defined in terms

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[5] "Sec. 3. The Brazos River Conservation and Reclamation District shall have and be recognized to exercise, . . . the powers of control and employment of such flood, storm and unappropriated flow waters of the said district in the manner and for the particular purposes hereinafter set forth.

"(a) To provide through the only practical and legal means for the control and the coordination of the regulation of the waters of the watershed of the Brazos River and its tributary streams as a unit."

[6] "Sec. 5. The District shall have the authority and it is hereby authorized to issue its negotiable bonds, secured only

of the "valley" and "watershed" of the Brazos River and its tributary streams. In consequence, the legislature provided that the permanent boundaries of the Brazos River Conservation and Reclamation District should embrace the watershed of the Brazos River and its tributary streams (excepting that portion within Freestone, Leon and Madison Counties), as defined by written course and distance calls prepared and filed by the State Board of Water Engineers. This vast area, covering parts of 65 counties, stretches diagonally across Texas, and is outlined on the map introduced as Plaintiff's Exhibit 7, which has been sent up in original form. Under the decisions of this Court, the creation of the District constituted an implied legislative finding that its works

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by pledge of the sums granted and/or donated by the State of Texas and/or out of any other current revenues of the District in any such amounts as may be authorized by the Directors of such District, which sums shall be paid to the legal holders of said bonds, for the purpose of purchasing, acquiring and/or condemning lands, leases, easements and/or acquittances, rights-of-way, structures and/or buildings, equipment, and/or operation of proper structures, dams, reservoirs, suitable for the control of the recurrent, *devastating floods in the valley of the Brazos River*, which have, over a long period of years, caused a deplorable loss of life and property, and the erosion of the soil and a depletion of the fertility of the lands *in said valley and the watershed served by the Brazos River in Texas*, and the public highways and structures and lands belonging to the State of Texas situated *within said water-shed;* all of which is hereby declared to be a public calamity, and doing all things necessary in the execution of the purposes for which the District is created and exists. The moneys herein and hereby granted and/or donated to the Brazos River Conservation and Reclamation District are declared to be for the purposes of discharging obligations herein authorized." (Emphasis supplied.)

would constitute a special benefit to all properties located *within* its boundaries. *Fallbrook Irrigation District v. Bradley* (1896) 164 U.S. 112, 174; *Milheim v. Moffatt Tunnel District* (1923) 262 U.S. 55, 58. But the implications arising from the statutory findings incident to the establishment of this District do not aid the argument advanced by appellees. The challenged taxes are not levied by the District, but by the State. The tax is not levied on all properties within the District: nor is it levied only on properties within part of the District. Instead, it is levied on properties within ten counties, whether the properties are located within the District or not.

We therefore respectfully submit that the very statutes which appellees cite, affirmatively disclose that the area found by the legislature to derive special benefit from Brazos District improvements is a distinct and different area from that within which the tax is imposed by the challenged statutes. These legislative findings moreover accord with the elementary physical fact that the dam built by the Brazos District on the Brazos River in Palo Pinto County can hardly be said with reason to constitute a special benefit to appellants' lands over two hundred miles away and situated in the watershed of the Trinity, a wholly different river system.

C. The 1936 decision of the Supreme Court of Texas in Brazos River Conservation and Reclamation District v. McCraw is not stare decisis of the validity of the amendment to the Texas Constitution adopted in 1948, providing for continued taxation of appellants' properties after 1951.

There remains to be noticed one final effort in the Motion to Dismiss or Affirm to discover some author-

ity to support appellees' "special benefits" argument. Appellees contend that the Supreme Court of Texas in *Brazos River Conservation and Reclamation District v. McCraw* (1936) 126 Tex. 506, 91 S. W. 2d 665, judicially determined that Grimes County is one of ten specially benefiting "from the public improvements undertaken by the Brazos District."

The *McCraw* case was a mandamus proceeding against the Attorney General of Texas to compel his approval of a bond issue of the District. The cause was submitted on an agreed statement of facts. The principal question there presented was whether the appropriation made to the Brazos District by the 1935 tax-donation act[1] constituted a "grant ... of public moneys" to a "municipal or other corporation" prohibited by Art. III, § 51 of the Texas Constitution, or whether the appropriation came within the exception allowing such a "grant of aid in cases of public calamity." Upholding the appropriation under the "calamity" exception, Mr. Chief Justice Cureton in the course of an extended opinion made the following remarks which appellees quote:

"The principal damage from overflows by the Brazos River lies south and southeast of Waco. The counties suffering most from this cause are shown [on attached map] in shaded portions or colors along the lower reaches of the Brazos, beginning with Milam and Robertson Counties and extending to the Gulf of Mexico * * *." 126 Tex. 506, 513, 91 S.W. 2d 665, 669.

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[1] Chap. 368, p. 1527, Acts 1st Called Sess. 44th Legis. of Texas.

Noting that Grimes County was within the shaded area on the attached map, appellees assert that this statement constitutes a judicial determination that Grimes County is one which would be specially benefited "by flood control." And appellees infer that the dam built by the Brazos District furnishes such "flood control." And by *construction* of the statement, appellees conclude that it constitutes a judicial finding of special benefits to Grimes County accruing from the dam built by the Brazos District.

In response, it is worthy of first notice that the argument is dependent upon the validity of appellees' assumption that the tax levied by the challenged statutes levy a tax for a specific public improvement. As has already been demonstrated, that premise is faulty, and in consequence argument as to assumed "special benefits" cannot sustain the challenged statutes.

But the suggestion that the quoted statement constitutes a judicial determination as to special benefits is intrinsically without merit. In the first place, there was no issue in the McCraw case involving a determination of whether Grimes County or any other county or counties, would be specially benefited by the proposed works of the Brazos District. No question was raised as to whether Grimes County or any other designated area could be taxed to support the proposed improvements, as no such tax was involved. In consequence, the question of special benefits was not briefed or mentioned by counsel for either side. A reading of the opinion of the Court will disclose that it did not undertake to determine such questions.

Moreover, the statement quoted from the opinion by appellees not only must be "construed" to have the meaning which appellees assert for it, but no basis for the statement can be found in either the agreed statement on which the case was tried, or in the pleadings or briefs of the parties. And while appellees make reference to legislative history, no act is cited which could furnish basis for the statement.

At all events it would seem obvious that such a statement, made *arguendo* in 1936 hardly can be considered determinative of the question whether the challenged statutes adopted twelve years and more later, deny to appellants the equal protection of the laws in discriminating against them in taxation beginning for the first time in 1951.

CONCLUSION

The Motion to Dismiss or Affirm should be denied, and the case should be set for argument.

Respectfully submitted,

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